

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

EX PARTE COMMUNICATIONS

Docket No. RM2016-4

REPLY COMMENTS OF THE UNITED STATES POSTAL SERVICE
(March 15, 2016)

The United States Postal Service respectfully submits this reply to certain comments filed in response to the Commission's proposed rules regarding ex parte communications.¹ Three sets of initial comments were filed in addition to those submitted by the Postal Service on February 29. This reply focuses on two sections of the Public Representative's comments.²

First, in Section IV.B, the Public Representative expresses a concern that the Commission's internal employee policy, which places restrictions on ex parte communications across all proceeding types (and imposes penalties affecting interests outside the Commission), may not be enforceable against non-employees or other "outsiders."³ This concern mirrors one of the principal issues raised by the Postal Service: that the Commission's Proposed Rules are impermissibly vague, leaving key details about application and enforcement to be defined only in an internal employee

¹ Order No. 3005, Notice of Proposed Rulemaking Regarding Ex Parte Communications, PRC Docket No. RM2016-4 (Jan. 8, 2016).

² See Public Representative's Comments, PRC Docket No. RM2016-4 (Feb. 29, 2016) [hereinafter "PR's Comments"].

³ *Id.* at 5-6.

policy that is potentially subject to change at any time.⁴ In its initial comments, the Postal Service suggested changes to the Proposed Rules that it believes would address these concerns.⁵

Second, in Section V, the Public Representative provides information intended to “clarif[y] and supplemen[t] the rulemaking record on the sources of authority for the original rules.”⁶ The Public Representative explains that, shortly after enactment of the Postal Reorganization Act (PRA) of 1970, President Richard M. Nixon issued Executive Order 11570 (EO 11570), captioned, “Providing for the Regulation of Conduct for the Postal Rate Commission and its Employees.”⁷ In EO 11570, President Nixon authorized the preparation of initial standards of conduct for the Commission’s predecessor entity, the Postal Rate Commission, including regulations providing for “strict control of *ex parte* contacts . . . regarding particular matters at issue in contested proceedings before the Commission.”⁸ Under EO 11570, the Postal Rate Commission was also given the authority to amend the regulations from time to time “consistent with this Order.”⁹ The PR’s Comments state that, since that early timeframe shortly after enactment of the PRA, the Commission’s *ex parte* rules have remained in effect “largely as originally drafted . . . , notwithstanding the sea change in the nature, scope, and

⁴ United States Postal Service Comments on Proposed Ex Parte Communications Rules, PRC Docket No. RM2016-4 (Feb. 29, 2016) [hereinafter “Postal Service Comments”] at 8-9.

⁵ *Id.* at 10 and Appendix A.

⁶ PR’s Comments at 8-11.

⁷ *Id.* at 9 (citing Exec. Order No. 11,570, 35 Fed. Reg. 18133 (1970)).

⁸ EO 11570 (emphasis in original) at § 102(b).

⁹ *Id.* at § 103.

number of Commission proceedings since enactment of the Postal Accountability and Enhancement Act (PAEA) of 2006.”¹⁰

It is unclear from the PR’s Comments exactly how the “sea change in the nature, scope, and number of Commission proceedings” should inform the Commission’s post-PAEA approach to ex parte communications. Without further elaboration as to how the Order should be applied to the current rulemaking proceeding, the Postal Service is concerned that the historical references to EO 11570 could cause confusion as to the proper scope and application of the Commission’s new rules. The Postal Service remains troubled by the Commission’s decision to “self-impose” an automatic, outright prohibition against ex parte communications across virtually all Commission docket types.¹¹ Neither the Administrative Procedure Act (APA) nor the PAEA require the stringent, one-size-fits-all restrictions the Commission proposes.¹² While EO 11570 does provide some historical context surrounding the initial Commission rules, a closer examination of its terms does not alleviate the concerns about overbreadth that the Postal Service raised in its initial comments.

In fact, the language used in EO 11570 to describe the proper scope of ex parte restrictions actually *supports* the Postal Service’s position. President Nixon called for strict control of ex parte communications with the Postal Rate Commission “regarding particular matters at issue in *contested proceedings* before the Commission.”¹³ Similarly, the Postal Service recommends that the Commission’s new rules should

¹⁰ PR’s Comments at 10-11.

¹¹ Postal Service Comments at 5-7.

¹² *Id.* at 5.

¹³ EO 11570 at § 102(b) (emphasis added).

apply only to certain “contested proceedings” where there are material issues in dispute.¹⁴ EO 11570 further recommended that regulation of ex parte contacts should include “the maintenance of public records of such contacts which fully identify the individuals involved and the nature of the subject matter discussed.”¹⁵ This language suggests that EO 11570 envisioned the “permit-but-disclose” approach discussed in the Postal Service Comments,¹⁶ rather than the outright prohibition (and accompanying harsh penalties) outlined in the Commission’s Proposed Rules.

In any event, Congress had the “perfect opportunity” to prohibit or limit ex parte communications in informal rulemaking proceedings when it passed the Government in the Sunshine Act in 1976.¹⁷ It had a more recent opportunity to require the Commission to apply formal, trial-type APA rules to additional types of proceedings when it passed the PAEA in 2006. Congress, of course, chose not to do so.¹⁸ Nothing in EO 11570 changes those important facts.

For the foregoing reasons, the Postal Service respectfully requests that the Commission: (1) account for the Postal Service’s concerns and recommendations in promulgating any final rules concerning ex parte communications; (2) clarify certain provisions within the proposed regulations as described in the Postal Service’s initial

¹⁴ Postal Service Comments at 10.

¹⁵ EO 11570 at § 102(b).

¹⁶ Postal Service Comments at 6-7, 18-20. *See also* Comments of MPA—The Association of Magazine Media, PRC Docket No. RM2016-4 (Feb. 29, 2016) at 4-5 (suggesting that the Commission could adopt a permit-but-disclose approach for informal rulemaking proceedings); Joint Comments of the Association of Mail Electronic Enhancement, *et al.*, PRC Docket No. RM2016-4 (Feb. 29, 2016) at 7-8 (same).

¹⁷ Postal Service Comments at 3-4 (quoting *Sierra Club v. Costle*, 657 F.2d 298, 401-402 (D.C. Cir. 1981)).

¹⁸ Postal Service Comments at 3-5. *See also* Order No. 3005 at 2 (acknowledging that the Commission is statutorily required to restrict ex parte communications only in matters that require the opportunity for a hearing on the record under the APA).

comments and in Appendix A to those comments; and (3) amend its internal policy on ex parte communications to address the concerns raised in the Postal Service

Comments and this reply.

Respectfully submitted,

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